

**COMMENTS OF THE GOVERNMENT OF THE UNITED STATES  
ON THE JAPAN FAIR TRADE COMMISSION'S  
DRAFT ANTIMONOPOLY ACT GUIDELINES CONCERNING  
THE ACTIVITIES OF TRADE ASSOCIATIONS**

**June 9, 1995**

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I. INTRODUCTION

The Government of the United States of America ("USG") respectfully submits these comments in response to the invitation of the Japan Fair Trade Commission ("JFTC") with regard to its draft "Antimonopoly Act Guidelines Concerning the Activities of Trade Associations" (the "draft Guidelines").

The USG is submitting these comments with two primary goals in mind. First, the USG hopes that its comments will encourage the further development of an effective antimonopoly policy and enforcement regime in Japan, in order to deter practices by trade associations that impede the competitive process in Japan. Second, the USG hopes that its comments will lead the JFTC to adopt new Guidelines that will promote the elimination of anticompetitive barriers created or maintained by trade association activities that impede the ability of American and other foreign firms to compete successfully in the Japanese market.

The USG has long been concerned that trade associations not be allowed to engage in anticompetitive practices that may impede the ability of foreign firms to do business in Japan. In this light, the USG has expected, based on the JFTC's promise in the 1992 SII Second Annual Report to "advance the review of matters relating to trade associations' activities from a viewpoint of competition policy," that the JFTC would strengthen its enforcement policy with respect to anticompetitive activities of trade associations. This expectation was reinforced with the release of the Deregulation Action Program in March of this year. In that action program, the Japanese Government affirmed that it was committed to "thoroughly prevent all violations of the Antimonopoly Act by practices of industry associations, including violations related to public regulation," and undertook to publish a revised draft of the 1979 Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act ("the 1979 Guidelines") and to formulate final guidelines by the end of 1995.

Trade associations play a very important role in the Japanese economy and marketplace. There are approximately 15,000 trade associations that have been registered with the JFTC. The 1993 report of the JFTC Study Group on Trade Associations ("the JFTC Study Group") found that of the 1002 associations surveyed, 71% of the responding associations indicated that the aggregate market share of their members was more than 50%. In fact, one-third of the associations indicated that the aggregate market share of their members was 90% or more. These statistics indicate that trade associations will often have a tremendous amount of influence and power in the market in which their members operate.

While trade associations can and often do provide important and pro-competitive benefits

to their members, trade associations also can serve as an organizing or facilitating body for anticompetitive practices. History has shown that this is not merely a theoretical possibility in Japan. Over the past decade, fully one-third of the Antimonopoly Act violations uncovered by the JFTC were committed by trade associations.

The potential influence of Japanese trade associations in the market is heightened significantly by the special and close relationship that typically exists between trade associations and the Japanese government agencies that oversee the industry concerned. Government officials often have a formal or *ex officio* position within trade associations, and government officials will frequently attend association meetings. It has been common in Japan for government agencies to issue administrative guidance to the industry through the association, or for agencies to delegate, formally or informally, certain public functions, such as industry regulation or standards and certification activities, to such associations. Indeed, the JFTC itself enforces industry self-regulation in the premiums and misrepresentations area.

The benefits deriving from the close relationship between the Japanese Government and industry associations were cited in the JFTC Study Group's report as among the most important advantages of association membership. 72% of the responding associations noted that members received readier access to administrative information and 29% responded that association members received smoother acceptance of applications filed with administrative authorities. More than 10% reported that members had an advantage in obtaining work consigned by government agencies or in securing loans and loan guarantees from the government.

Thus, membership in trade associations in Japan may frequently be a strongly advantageous, if not absolutely necessary, factor in competing successfully in the Japanese market, even for Japanese firms. For foreign firms, who do not have the established business relationships and sources of commercial and administrative information of their Japanese competitors, the benefits associated with trade association membership may be even more crucial. With this background in mind, trade association guidelines that reflect a strong and effective JFTC enforcement policy with respect to exclusionary and other anticompetitive practices by trade associations will be a key factor in ensuring that the Japanese market is truly competitive and open to competition from all sources, both foreign and domestic.

## II. GENERAL COMMENTS

The USG welcomes the JFTC's efforts to revise its 1979 Guidelines. The draft Guidelines improve on the 1979 Guidelines in several ways. In particular, the new sections dealing with unfair trade practices and conduct relating to government regulation are useful additions, as are the expanded discussions of self-regulation standards and the inclusion of some guidelines on membership restrictions.

On the other hand, the JFTC has omitted some important anticompetitive conduct from the draft Guidelines. In particular, the draft Guidelines, we believe, do not adequately address such activities as exclusionary actions in the context of government-related standards and

certification activities, black-lists and other direct and indirect boycotts, discrimination on association membership and on participation in key association decision-making bodies, access by non-members to necessary trade association benefits, and the failure of trade associations to conduct its activities in a transparent manner and in a manner that accords due process to all affected persons. We hope that these omissions, as detailed in our specified comments below, will be remedied in the final Guidelines.

We note that the Japanese Government's March Action Program commitment to "thoroughly prevent all violations of the Antimonopoly Act by practices of industry associations, including violations related to public regulation," cannot be achieved through these Guidelines alone. The adoption of strong and clear Guidelines must, of course, be accompanied by an ever-vigilant and vigorous JFTC enforcement posture. We also continue to believe that certain amendments to the AMA -- including subjecting trade associations to surcharges where the association itself has reaped a financial benefit from its illegal activities and making trade associations jointly and severally liable for damages to private parties caused by their violation of Sections 3 or 8 of the AMA -- are necessary in order to deter antimonopoly violations by trade associations.

We also note that the JFTC alone cannot stamp out and prevent all anticompetitive practices by trade associations. All Japanese Government agencies that formally or informally oversee the activities of trade associations must fully cooperate in this effort if the March Action Program pledge is to be realized.

### III. SPECIFIC COMMENTS

#### A. PART 1.

##### 1. Definition of "Trade Association"

The definition of "trade association" included in the draft Guidelines may both exclude associations that should be covered and include certain combinations of firms that would more properly be viewed as joint ventures.

We understand that this definition is drawn from Section 2(2) of the Antimonopoly Act ("AMA"). However, the explanation of the term "principal purpose" appears to exclude associations that have as a very important, but not most important, purpose "the furtherance of the common business interests of firms." We can envision an association that may have as one of its principal purposes the furtherance of some social goal, such as environmental protection, but that also promotes as a central goal, the business interests of its members. Such an association should not, we believe, be excluded from the scope of these draft Guidelines (or, for that matter, from Article 8 of the AMA.) We suggest that the interpretation of this definition be modified to include combinations that have as one of their principal purposes "the furtherance of the common business interests of firms."

We also recommend that the interpretation of the statutory definition of trade association be clarified to exclude all joint ventures that have as their sole or principal purpose the conduct of business for profit. The discussion in the last paragraph of Part 1.2 of the draft Guidelines indicates that such joint ventures may be excluded if they have capital stock or capital subscriptions made by the constituent firms. However, some joint ventures between firms may be organized as partnerships, or simply through contract. The competitive implications of these forms of legitimate joint ventures might best be analyzed under the standards for Articles 15 and 16 of the AMA, rather than Article 8 of that Act.

2. Definition of "Substantially Restraining Competition in any Particular Field of Trade"

The definition of "substantially restraining competition in any particular field of trade" contained in the draft Guidelines has generally been expanded from the definition contained in the 1979 Guidelines, and we believe that expansion is helpful. However, the new definition does not appear to include restraints on production, technology or equipment, which were included in the 1979 definition. We believe that restraints on production, technology or equipment may have serious anticompetitive effects and recommend, therefore, that such restraints be added back into the new definition.

3. Definition of "Causing Firms to Engage in Conduct that Constitutes Unfair Trade Practices"

The definition of "causing firms to engage in conduct that constitutes unfair trade practices" contained in the draft Guidelines omits some important categories of unfair trade practices that were included in the definition used in the 1979 Guidelines. Specifically, the 1979 Guidelines included "dealing on exclusive terms" as one example of conduct that, if a trade association pressured its members to engage in, would fall within the prohibition of Section 8(1)(v) of the AMA. Unless the JFTC intends that pressuring association members to engage in anticompetitive exclusive dealing will now be covered by another paragraph of Article 8, we recommend that the JFTC add this concept back into the definition in the draft Guidelines.

In addition, the 1979 Guidelines contained the following explanatory paragraph, which we think was useful:

"Specifically, this provision is often applied to cases of imposing pressure against the trading partners of constituent entrepreneurs to cause them to refrain from dealing with non-members, or imposing pressure against such trading partners to impose discriminatory measures such as the suspension of shipments to discount vendors."

American firms have frequently expressed concern about just this sort of conduct occurring in Japan. We urge the JFTC to add this paragraph back into the definition. Its current omission may give readers the impression that the JFTC no longer intends to enforce the AMA against this sort of conduct.

## B. PART 2. -- INTRODUCTION

### 1. Conduct Commissioned by the Government

We recommend that the discussion on conduct commissioned by government in Part 2(6) of the draft Guidelines be strengthened. Nowhere in the draft Guidelines is it made clear that conduct undertaken pursuant to administrative guidance may still violate the AMA. We suggest that the JFTC add a sentence to this section along the lines of the language on this point in the 1979 guidelines, to wit:

"If a trade association activity invoked by administrative guidances by other government agencies violates the Antimonopoly Act, such administrative guidances do not itself eliminate the illegality of such act."

### 2. Decisions of a Trade Association

The discussion on "decisions" of a trade association in Part 2(8) of the draft Guidelines indicates that decisions of committees or subcommittees that are "habitually" treated as those of the entire association will be treated as such by the JFTC. We believe it would be useful to add to this paragraph the notion that even if the action of the committee or subcommittee is not deemed to be an action of the entire association, the members of the committee or subcommittee will still be subject to enforcement action based on articles 3 or 19 of the AMA for any anticompetitive activities that may ensue.

## C. PART 2. -- CATEGORIES

### 1. Category 1: Conduct that Restricts Prices

#### a. Actions that Constitute Price-Fixing

Section 1-1 does not include decisions by a trade association to lower sales prices, or to raise purchase prices, by an amount less than what the market would otherwise have dictated. We view this type of agreement as unlawful price-fixing, based on the U.S. Supreme Court's holding in U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity ... is illegal per se." We therefore recommend that the JFTC add decisions to lower sales price, or raise purchase price, by less than what the market would dictate to the category of price-restricting conduct discussed in section 1-1.

### 2. Category 2: Conduct that Restricts Quantities

#### a. Actions that Constitute Restrictions on Quantities

Section 2-1 includes as prohibited behavior restrictions on the quantities of goods or services supplied or received by constituent firms. We recommend that the JFTC also include restrictions on quantities of goods or services produced, since production restraints can have the same pernicious effect on the market as do sales restraints.

3. Category 3: Conduct that Restricts Customers, Sales Channels, etc.

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a. Formulation of "Black Lists"

Guideline No. 3-5 of the 1979 Guidelines included as an act likely to constitute a violation: "to formulate and distribute a list of particular entrepreneurs categorizing them as favorable or unfavorable." However, this class of conduct appears to have been omitted from Category 3 of the draft Guidelines. We think the formulation and distribution of black lists by trade associations should continue to be viewed as an illegal practice, at least where they are not developed in an objective manner and with a valid commercial justification (such as a list, compiled on the basis of objective factual data, of firms that have poor credit histories, etc.) Consequently, we recommend that language addressing the formulation of "black lists," similar to that of guideline 3-5 in the 1979 Guidelines, be incorporated into this section.

4. Category 4: Conduct that Restricts Facilities and Technology

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a. Closing, Mothballing or Conversion of Facilities

Section 4-1 of the draft Guidelines prohibits restrictions on the construction, expansion or demolition of facilities. We question whether the JFTC should be concerned only about "restrictions" on such activities; a better word might be "regulation" or "control," since that would cover trade association activities that seek to control the independent decisions of firms with respect to the construction, expansion or demolition of facilities. In addition, we note that the same anticompetitive effects from regulating the "demolition" of facilities would also result from regulating the "closing" or "mothballing" of the facilities. Similarly, a trade association might cause the same anticompetitive effects by regulating the conversion of existing facilities to other uses. We recommend, therefore, that the JFTC expand this section to include the "closing, mothballing or conversion to other uses" of facilities used to supply or receive goods or services.

5. Category 5: Conduct that Restricts the Entry of Firms, etc.

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a. Restricting the Supply of Goods or Services

Section 5-1-1 declares unlawful the "forcing" of constituent firms or their customers to restrict the supply of goods or services to a specified firm. This section appears to

be too narrow in two ways. First, it may be difficult for the JFTC to show that a firm was actually "forced" to restrict supply. We believe the JFTC should also consider unlawful a trade association "coercing" (found in section 1-2) or "pressuring" (found in the example in section 6-1) firms or their customers to restrict supply, or even "encouraging" (also found in section 1-2) such firms to restrict supply (unless in the context of pro-competitive standards-setting activities). Second, we suggest that the prohibition apply not just to restrictions of supply to a specified firm, but also restrictions of supply to a group of firms, such as foreign firms or non-members of the association.

b. Restricting the Handling of Goods or Services

Section 5-1-2 prohibits the "forcing" of constituent firms or their customers to restrict their receipt or handling of goods or services from a specified firm. Again, we believe that the JFTC would be well-advised to substitute the words "encouraging," "coercing" and/or "pressuring" for "forcing" so that associations understand that all conduct that has as its goal the collective restriction of purchases or handling is unlawful. In addition, we recommend that, as in section 5-1-1, this prohibition apply where the collective restrictions are applied to groups of firms, such as foreign firms or non-member firms. Further, we suggest that the illustrative example in 5-1-2{2} be expanded to cover situations where the trade association encourages its constituent firms to pressure their distributors to refuse to handle (or to handle only token amounts of) the goods of firms attempting to enter or expand their share of the market.

c. Boycotts

Direct and indirect boycotts, as discussed in Guideline Nos. 10-1 and 10-2 of the 1979 Guidelines, should, we suggest, be included in the draft Guidelines. Illustrative cases, such as the X Association of Automobile Glass or Repair Use Distributors case included in Guideline 10-2, should also be included. Exclusion of these types of conduct from the new Guidelines may otherwise give readers the impression that the JFTC no longer considers direct or indirect boycotts by trade associations to be actionable.

d. Discriminatory Treatment

We recommend that trade association activities that promote discriminatory treatment of non-members, such as discussed in Guideline No. 10-3 of the 1979 Guidelines, also be included in the draft Guidelines. The illustrative case included in Guideline 10-3 -- The X Association of Pyrethrum Insecticide Manufacturers and Association of Y Pyrethrum Growers Case -- is a very useful example. We therefore recommend that this illustrative case be restored in the new Guidelines as well.

e. Restrictions on Membership and on Access to Benefits of Trade Associations



Section 5-1-3, and the three subcategories under subparagraph (1) of that section, indicate that the JFTC will strongly suspect a violation of the AMA where unjust restrictions on membership in the association make it difficult for a firm to conduct business. This section is a new and welcome addition to the draft Guidelines. We suggest, however, that this section be expanded to encompass a broader range of conduct that could be used to prevent firms from joining trade associations or from obtaining the services of trade associations that may be necessary to compete successfully in Japan. In particular:

(1) We recommend that discriminatory practices on membership be specifically discussed in the draft Guidelines. As recommended by the JFTC Study Group, we suggest that this section make clear that discrimination on membership based on nationality, place of incorporation or the existence or length of business experience in Japan, etc. are equally unacceptable where denial of membership may significantly impede the ability of the excluded firm from being an effective competitor in the market.

(2) The JFTC Study Group's report also recommended that new AMA guidelines include a discussion of the unacceptability of discrimination against foreign firms with respect to participation in internal management meetings of the association, if exclusion from such meetings denies the excluded firm access to competitively-important information. We agree with this recommendation, especially where the information is essential in order to compete successfully in the market, and suggest that appropriate language to that effect be added to the draft Guidelines.

(3) It is important that trade association activities that affect non-member firms, such as the development and implementation of standards and certification requirements or membership and expulsion procedures, be conducted pursuant to due process, with adequate transparency and with full account being taken of the views of non-member firms and of other interested or affected parties. The JFTC Study Group reached the same conclusions. We therefore suggest that the new Guidelines include a section indicating that the failure of trade associations to conduct their activities in an open and transparent manner may constitute a violation of section 8(1)(i),(iii) or (v), depending on the specific circumstances.

f. Interference with Transactions

Interference by a trade association with the transactions of non-members, such as through unfair disparagement of the character of non-member firms or their products, can result in anticompetitive effects in the market. We therefore recommend that this category of conduct be included in the revised Guidelines, as it was in Guideline No. 10-4 of the 1979 Guidelines.

g. Access by Non-Members to Association Benefits

The JFTC Study Group recommended that trade associations not be

permitted to discriminate against non-members in providing the benefits of the associations, where such discrimination is likely to hamper the non-members' business. Rather, in such circumstances, the trade associations should make competitively-necessary benefits, such as participation in and access to comprehensive industry statistical reporting mechanisms, available to non-members at reasonable cost and burden. Similarly, opportunities to participate in joint exhibitions and similar events organized or sponsored by trade associations should be made available to non-members where participation is "indispensable for smooth business activities." The JFTC Study Group noted that no participant (whether a member or non-member) should be subjected to unreasonable and discriminatory treatment. We recommend that language incorporating the above points be added to the draft Guidelines.

6. Category 6: Unfair Trade Practices

a. Concerted Refusals to Deal

Section 6-1 addresses concerted refusals to deal engaged in by a trade association or caused by a trade association. We recommend that this section be expanded by adding the six types of conduct specified in the section of the Distribution Systems and Business Practices Guidelines on "Refusals to Deal Arranged by Trade Associations." In addition, we believe it would be useful for the JFTC to provide more detail about the facts in the specific example of "The Y Trade Association of Lumber Importers" (FTC Recommendation No. 16 of 1990) included in section 6-1. Specifically, it would be helpful to describe the specific methods employed by that association in preventing non-constituent firms from importing lumber, and the means used to pressure the harbor transport companies to refuse to handle lumber imported by non-constituent firms. A clear statement that the JFTC is committed to strict enforcement against this sort of conduct will be viewed as very important by American and other foreign firms trying to do business in Japan.

7. Category 7: Conduct Relating to Variety, Quality, Standards, etc.

a. Government-related Standards and Certification Activities

As a general matter, this section of the draft Guidelines is much improved over the equivalent section of the 1979 Guidelines. The discussion of self-regulation and autonomous certification activities has been expanded, providing useful guidance to both trade associations and firms.

However, the section fails to address the applicability of the AMA to standards-making and certification activities delegated or otherwise tasked to the trade association by the government, or to private standards-making where the standards are likely to be followed by or adopted into government regulations or policies. These activities present special competition-related problems, since discrimination in these activities may lead to legal exclusion from the market. Therefore, we think it extremely important that the JFTC add to this section of the Guidelines a discussion of antimonopoly problems that may arise in the context of developing standards or implementing certification systems where there is a direct government connection.

b. Transparency and Due Process in Standards and Certification Activities

The JFTC Study Group report highlights concerns that a lack of transparency and due process in trade association standards-making and certification activities may have the effect of excluding outsiders from being able to compete effectively in the market. The JFTC Study Group recommended that trade associations conduct such activities in a transparent manner and with procedures for the receipt and impartial consideration of the opinions of all relevant parties, including non-members. In particular, the JFTC Study Group pointed out that associations should "establish an impartial and neutral body to take charge of certification, such as a screening committee, and make efforts to ensure its fair and transparent management." We agree with these conclusions and recommend, in this light, that the JFTC add a section to the draft Guidelines indicating that the failure of a trade association to undertake its standards-making and certification activities in a transparent, non-discriminatory and impartial manner that takes appropriate consideration of all views, including those of non-members, may constitute a violation of the Antimonopoly Act.

c. Judgments Concerning Self-Regulation, etc.

In section 7(2)A of the draft Guidelines, the JFTC sets out three factors that it will consider when judging whether a given self-regulation activity is anticompetitive. The third factor appears to hinge on whether the activity is beyond the "necessity rationalized to achieve social or other rightful purposes." However, the draft Guidelines explain neither the procedure nor the standard for determining whether the purpose of an activity is a "social or other rightful purpose." We suggest that the JFTC clarify this section by noting that normally the JFTC will examine whether the purpose of the activity is pro-competitive, whether the method chosen for achieving that purpose is reasonably related to the attainment of that goal and whether there are less competition-restricting alternatives.

d. Appropriate Purposes of Self-Regulation and Autonomous Certification

Notes 1-3 in section 7(2) all appear to base the legality of self-regulation and autonomous certification activities on whether the purpose of the activity is one "that the association considers rightful." If the test for legality of activities depends on whether the association believes its motives are "rightful," then it would allow an effective exemption if the association believes that restricting competition with or among members was a "rightful" purpose. We assume that this could not have been the JFTC's intent. In the United States, anticompetitive conduct is not excused merely because the relevant firms were acting with what they thought were good motives. We suggest that the JFTC revise these provisions, and incorporate instead a standard based on whether the purpose of the activity is pro-competitive, whether the activity is reasonably related to the achievement of such a pro-competitive purpose and whether there are less competition-restricting alternatives.

e. Standards "With no Legal Effect"

Note 4 in section 7(2) permits trade associations to issue certifications, authorizations, etc. with respect to standards "with no legal effect" that have been established by government agencies. We do not understand what it means to have a standard established by a government agency that has no legal effect, and therefore suggest that this issue be clarified.

f. Discriminatory Self-Regulation Against Groups

Section 7-2 provides that establishing or implementing self-regulations that discriminate against a specific firm would be suspected to violate the AMA. We believe that this section should be expanded to cover discrimination against a specific group of firms, such as foreign firms or new entrants, since trade associations may attempt to exclude whole groups as well as individual firms from the market.

8. Category 8: Conduct Relating to the Type, Content, Method, etc. of Business Operation

a. Discriminatory Self-Regulation against Groups of Firms

Section 8-3 includes in the "suspected to constitute a violation" category the establishment of self-regulations that discriminate against a specific firm. We recommend that this section be expanded to cover discrimination against groups of firms, such as discrimination against foreign companies or non-constituent firms.

b. Exception for Socially Beneficial Purposes

Section 8-4 appears to permit trade associations to establish guidelines for the type, content or method of business operations (other than discriminatory or mandatory criteria) so long as the guidelines are "within the necessity rationalized" to achieve a socially beneficial purpose. However, the draft Guidelines provide no guidance as to what a "socially beneficial purpose" might be, or who will determine if the purpose is indeed "socially beneficial." For example, this language might be read to permit a trade association to adopt some competition-restricting guidelines for the purpose of ensuring that the member firms not operate at a loss, or that "needless" competition not take place. We do not believe that the JFTC should allow anticompetitive arrangements to be excused by other social purposes, unless there is an efficiency justification or it is expressly provided for by some other legal authority. At a minimum, we suggest that the JFTC make this section much clearer as to what purposes will be considered "socially beneficial" and how the means used to attain such a purpose will be balanced against the potential anticompetitive harm to consumers.

c. Model contracts

Section 8-7 permits a trade association to create model contracts for its

members. However, some provisions that may be included in a model contract could have anticompetitive effects, such as a provision that is directly aimed at excluding or eliminating competition. The JFTC Study Group's report highlights a similar concern. Therefore, we suggest that the JFTC clarify that model contracts that have the effect of restraining competition may violate the AMA.

9. Category 9: Information Activities

a. Information Provided by Government Agencies

This section provides useful guidance on a broad range of information activities by trade associations. However, the section fails to address competitive problems that may arise where trade associations are provided information by the government that is not easily available from other sources. For example, government agencies may provide a trade association with product standards that must be met before a product or service can be procured by the government or before a product will be approved for sale in accordance with government regulations. Where the government information is important to the business operations of firms in the market, and where it is not easily available from sources other than the association, then the refusal of the trade association to provide the information to non-members may well be anticompetitive. The JFTC Study Group pointed out this problem as well, and called on trade associations to "take due care to make such information readily available to outsiders" where the lack of access to the information will hamper the business activities of outsiders. We therefore suggest that the JFTC add a section to the draft Guidelines making it clear that the refusal of a trade association to make such information available to non-members is likely to constitute an antimonopoly violation.

10. Category 10: Management Guidance

a. Management Guidance that Leads to Restraints on Competition

We agree with the JFTC that there are many instances where management guidance to member firms should not pose a problem under the AMA. We also agree that where a trade association's management guidance leads to competition-restricting conduct, such as price-fixing, it should be prohibited. We suggest, however, that the JFTC make clear that management guidance that leads to other anticompetitive effects, such as supply restrictions (cited in the 1979 Guidelines) or other unlawful practices mentioned in these draft Guidelines, will also be deemed to violate the AMA.

11. Category 11: Joint Undertakings

a. Market Shares of Firms Participating in Joint Undertakings

Section 11(2)B states that joint undertakings are more likely to pose problems under the AMA where the participating firms have a high market share and are in an

influential position in the market. This language appears to refer to the individual market shares and position in the market of each of the participants to the joint undertaking. We suggest that the JFTC clarify that even where the participants individually have a relatively low share of the market, if the combined market share of all of the participants is high, the joint undertaking also is more likely to present problems from an antimonopoly perspective.

12. Category 12: Conduct Relating to Government Regulations, Administration, etc.

a. Restrictions on Access to Government Information

As discussed in our comments on information activities (Category 9), we believe that the JFTC could improve the Guidelines by addressing conduct by trade associations that

denies non-members access to key government-provided information not readily obtainable from other sources.

IV. NECESSARY ACTION BY OTHER JAPANESE GOVERNMENT AGENCIES

Improved antimonopoly guidelines, even combined with vigorous enforcement by the JFTC, will not be sufficient to prevent and eliminate all anticompetitive activities by trade associations. The active support of all government agencies that oversee or supervise trade associations will also be needed if this goal is to be realized. As a preliminary matter, this will require, at a minimum, that the JFTC explain the content of these Guidelines to all relevant government agencies. In addition, in line with the recommendations and conclusions of the JFTC Study Group, we believe that the active support of the JFTC's efforts by such government agencies must entail the following specific actions:

- o All government agencies must avoid urging trade associations to engage in conduct that contravenes these Guidelines, and should report suspected infractions of the AMA by trade associations to the JFTC.
- o Agencies should avoid delegating, formally or informally, governmental functions, such as product certifications or entry authorizations, to trade associations.
- o Where it is necessary for trade associations to have a role in granting of permissions or approvals, or in establishing standards or issuing certifications, or to engage in any other quasi-public functions, the administrative agency involved must exercise adequate supervision over the association.
  - That supervision should ensure that the activities are conducted in an open, transparent and non-discriminatory fashion and that business activities of all firms, including non-members of the association, are not restricted.

- o The relevant government agencies should verify that regulations adopted by trade associations that may have an effect on the conduct of business in Japan reflect the opinions of non-members, including the foreign business community.
- o Government agencies should make transparent and public all guidance given to trade associations, and should ensure that government information provided to trade associations is also readily available to non-members.

## V. CONCLUSION

The USG acknowledges the substantial efforts of the JFTC in preparing these draft Guidelines. On the whole, they represent a significant improvement over the 1979 Guidelines, particularly in their added treatment of unfair trade practices, membership restrictions and standard-setting activities. We also found very useful the guidance provided on trade association activities relating to government regulation and action. Our suggested changes and additions to the draft Guidelines, including our references to sections of the 1979 Guidelines that we think would usefully be incorporated into the new Guidelines, have been provided in the spirit of making the application of the AMA to trade association activities as clear as possible.

The USG appreciates being given the opportunity to submit comments on these draft Guidelines. We remain available to consult with the JFTC about these comments, or to provide any other assistance that the JFTC may request with respect to preparing the final Guidelines. If there are any questions about these comments, please contact Stuart M. Chemtob, Special Counsel for International Trade, Antitrust Division, U.S. Department of Justice.